THE BAIL SYSTEM: IS IT ACCEPTABLE?

Society today is concerned about poverty. All branches of the Federal government are directing their efforts toward the alleviation of the burden of this economic disease. Congress and the Executive have declared war on poverty—pursuing it with varying degrees of vigor. For perhaps a longer time, the judiciary has been following a parallel path. In *Griffin v. Illinois*[1] the Supreme Court expressed its concern for the protection of the indigent defendant within our criminal judicial system, and the Court has continued its concern.[2] In *Griffin* the statutes involved were fair on their face and administered without apparent discrimination, yet the Supreme Court held the procedure to be unreasonably discriminatory because it led to differing results dependant upon the economic status of defendants. Justice Black said that "[t]here can be no equal justice where the kind of a trial a man gets depends on the amount of money he has."[3] The Court seemingly relied on both the due process and equal protection clauses in creating a new standard of constitutionally permissible conduct for the states. Today the effects of state action and inaction on different economic strata must be considered in constitutional terms—not because of a legislative or executive war on poverty but because of the Court's new standard for constitutionally acceptable behavior. This article will concern an area of state action within the criminal system in terms of its constitutional validity as it affects various economic levels—the present bail practice. It is constitutionally suspect for it produces different results depending on the economic status of the defendant. The operation of the bail system is affected by the financial position of the defendant, with those defendants in the throes of poverty faring worst.

With the exception of limited reforms, the bail system in the United States operates with great reliance being placed on the commercial bondsman.[4] His unique role is one of providing the pos-

1 351 U.S. 12 (1956) (indigent's right to transcript necessary for appeal on nonconstitutional errors in state court where appeal a matter of right).

2 Douglas v. California, 372 U.S. 353 (1963) (indigent's right to counsel on first appeal in state court where appeal is granted as a matter of right); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent's right to counsel in all state felony cases); Smith v. Bennett, 365 U.S. 708 (1961) (financial impediments may not condition the availability of the writ of habeas corpus); Burns v. Ohio, 360 U.S. 252 (1959) (nonpayment of a docket fee may not preclude criminal appeal).

3 Griffin v. Illinois, 351 U.S. 12, 19 (1956).

4 D. J. FREED & P. M. WALD, BAIL IN THE UNITED STATES: 1964 at 22 (1964) [hereinafter cited as BAIL IN U.S.].

sibility of freedom from detention pending trial or appeal to the defendant who cannot raise the total cost of bond through his own financial resources. This possibility may be realized at costs which vary widely throughout the nation. The defendant must pay a premium based on a percentage of the amount of the bail bond in addition to a service charge. Premiums are often paid through an installment method, with the bondsman pledging to the court a bond equal to the total amount of the bail. This obtains the defendant's release with the prospect that if the bondsman fails to produce the bailee on the appointed date, the bond will be forfeited. The court is relying on the profit motives of a bondsman to assure the defendant's presence at trial. If the defendant appears, the bondsman is relieved of his liability, but the defendant has purchased his freedom for the unrefundable price (premium plus service charge) of the bondsman's services. Of course, in many instances an indigent cannot afford the premium; with little hope of payment from the indigent, the bondsman will often refuse to post the necessary bond and the indigent remains in jail. This is so frequent an occurrence[5] it deserves serious attention.

A. *History*

Bail developed in medieval England as a means of giving freedom to persons accused of a crime between apprehension and the long-delayed trials which were so prevalent in that day.[6] The necessity for having some method of assuring the presence of the defendant at trial was a result of the relative insecurity of the medieval jails. It was considered better to release a defendant with some assurance of his return rather than have the defendant obtain his freedom through escape.[7] The sheriffs seemed to enjoy a discretionary power to detain or release those who were arrested;[8] release

5 *See* Silverstein, *Bail in State Courts: A Field Study and Report*, 50 MINN. L. REV. 621 (1966); Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693 (1958); Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954). It has been determined from one study that bail produces the largest disparity from an economic viewpoint among presentencing stages. A 52 percentage point difference was found between the percentage of indigents and non-indigents released on bail in assault cases. Nagel, *Disparities in Criminal Procedure*, 14 U.C.L.A. L. REV. 1272 1279 (1967).

6 On the history of bail, *see generally* Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961); Longsdorf, *Is Bail a Rich Man's Privilege?*, 7 F.R.D. 309 (1948).

7 II F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 584 (2d ed. 1899).

8 *Id.*

was normally into the custody of a friend or relative who was then considered to be the defendant's jailer and surety. Referred to as *mainprise*, this procedure required the sureties to produce the accused for trial or suffer imprisonment themselves. In some cases the sheriff would accept a sum of money in place of surrender of the surety. The system of personal surety continues in England today;[9] but the English Bill of Rights[10] prohibits excessive bail in a manner similar to the eighth amendment of our Constitution. There has been a general tendency in England to admit all but the most serious offenders to bail on the least restrictive terms, often personal recognizance.[11]

In the United States the constitutional guarantee of the right to seek a writ of habeas corpus[12] and the prohibition against excessive bail[13] expressed the colonial philosophy of respect for personal liberty. Two years before the Bill of Rights was ratified, the Judiciary Act of 1789 established a right to bail in the federal system for all but capital cases.[14] The constitutions of most states have guaranteed this right in the state courts.[15] Instead of the personal surety method, monetary bond developed in the United States as the means of assuring the presence of the defendant at trial. As a result, the bondsman became a commercial companion to the judicial function of bail determination. With mainprise, economic status was only of secondary importance, but in America economic incentives are presently the primary means of assurance. The result is a system in which the attainment of release through bail is impossible for many defendants because of their inability to post personally the required bond or to secure the services of a bondsman.

B. *Theory of Bail*

The primary function of bail is to assure the presence of the defendant at trial while giving him his liberty before the often long-

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9 Magistrates' Courts Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 7 at 1215 (1952).

10 1 W & M. 2, c. 2 (1688).

11 D. KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE 138 (1967).

12 U.S. CONST. art. I, § 9, cl. 2.

13 U.S. CONST. amend. VIII.

14 Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 73.

15 *E.g.*, OHIO CONST. art. 1, § 9: "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great." This guarantee appears in the constitutions of 36 States. Comment, *Determination of Accused's Right To Bail In Capital Cases*, 7 VILL. L. REV. 438, 450 (1962).

delayed decision on his guilt or innocence.[16] As late as the 19th century, bail was looked upon as "being nothing more than a security for the appearance of an offender."[17] The idea of bail before trial can be explained as a corollary to the presumption of innocence of those accused of a crime.[18] Bail relieves the accused (if he is able to obtain bond for the amount set) of the experience of having to remain in jail until trial[19] which in many instances might be for protracted periods.[20] It relieves the state of the costs and burdens of maintaining facilities to hold all defendants and at the same time permits the court to retain a form of custody over the defendant.[21] While there may be a risk that the accused will take flight even when released on bail, pre-trial detention cannot be condoned.[22] Society may be alarmed by the release of a particular defendant due to the gravity of the crime committed, but the greater danger of compromising our fundamental concepts of liberty and innocence caution us to remember the function of bail.[23]

C. *Theory in Practice*

It is disturbing to discover the extreme dichotomy between the legal rules designed to effectuate these policies and the working effect of such rules. Critics of the present system of bail focus on the gap between the goals sought and the actual results. This incon-

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16 Stack v. Boyle, 342 U.S. 1, 5 (1951); *In re* Lonardo, 86 Ohio App. 289, 291, 89 N.E.2d 502, 503 (1949).

17 A. HIGHMORE, A DIGEST OF THE DOCTRINE OF BAIL; IN CIVIL AND CRIMINAL CASES 192 (1791).

18 Quattrocchi v. Langlois, 219 A.2d 570, 573 (R.I. 1966).

19 This article will be directed toward the question of bail before trial. After conviction there is a lack of the presumption of innocence; thus the courts find it much easier to deny bail pending appeal. As one court has said, "the matter of bail in these cases [appeals] is not a matter of strict legal right, but of legal favor, to be granted or denied, as justice, both to the defendant and to society, may demand." Sioux Falls v. Marshall, 48 S.D. 378, 391, 204 N.W. 999, 1005 (1925).

20 In 1963 the median time defendants not released on bail remained in jail was 96 days. McCarthy & Wahl, *The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for a Change*, 53 GEO. L.J. 675, 691 (1965).

21 *State v. Olson*, 152 N.W.2d 176, 177-78 (S.C. 1967).

22 With the exception of state provisions relating to capital crimes, present law does not authorize pre-trial detention for any purpose except to protect against flight. But if preventive detention were the goal for the bail system, a manipulation of the bail system would not be the proper method to achieve it, for preventive detention through high bail would fail whenever the defendant had financial resources sufficient to post bond. Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966).

23 Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

sistency led one writer to say that, in the current civil rights cases, if the observer did not know better he might conclude that "the purposes of bail are harassment, punishment, deterrence, imprisonment before trial and the imposition of unnecessary expenses on civil rights organizations."[24] Such an observation does not seem inaccurate after a review is made of the findings of the Philadelphia Bail Study. In that study a survey of local magistrates revealed they set high bail with the goals of deterrence, punishment and, astonishingly enough, rehabilitation.[25] One of the clearest admissions by a member of the bench that the bail system is misused and results in the detention of those whose liberty might otherwise be preserved was that of a New York county judge who said, "[Q]uite candidly, I think many of us judges do hold people to teach them lessons, even though we know that they are supposed to be held only to secure their return."[26]

It is not surprising then to find from other recent studies that among the larger city-counties only forty-seven percent of the defendants were released on bail. Chicago released a low of twenty-five percent while Philadelphia freed a high of eighty-six percent.[27] Does this mean that the defendants in Chicago were three times as likely to flee as those in Philadelphia? Probably not. The results can be explained by the use of bail schedules which differ greatly between localities. For a particular offense bail is arbitrarily set on the schedule at a figure which the court feels will insure against flight without consideration being given to the circumstances of the individual defendant. Experience has shown that the amount required to assure the presence of the defendant is much less than is often demanded. The Philadelphia and Chicago statistics reflect the

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24 Wizner, *Bail and Civil Rights*, 2 LAW IN TRANSITION Q. 111 (1965).

25 Some magistrates candidly admitted that they set high bail to "break" crime waves, keep the defendant in jail, cut him off from his narcotic supply, protect women, "make an example" of a particular abusive defendant, make him "serve some" time even where acquittal was a certainty, or protect arresting officers from false arrest suits.

BAIL IN U.S., *supra* note 4, at 11.

26 BAIL AND SUMMONS: 1965 PROCEEDINGS OF THE INSTITUTE ON THE OPERATION OF PRETRIAL RELEASE PROJECTS 118 (1966) [hereinafter cited as BAIL & SUMMONS: 1965]. Recently a federal court said in dictum that a State court might deny bail where it appeared necessary to prevent a threat or likelihood of interference with the process of investigation. Mastrian v. Hedman, 326 F.2d 708, 712 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964).

27 Silverstein, *Bail in State Courts—A Field Study and Report*, 50 MINN. L. REV. 621, 624 (1966).

various amounts considered necessary. In Philadelphia only one percent of the defendants had bail set at more than $5,000, while in Chicago bail was more than $5,000 for seventy-seven percent of the defendants.[28]

The studies just referred to point out that the blatant disregard for the spirit of bail results in bail servings as an assurance of detention rather than assuring predisposition freedom from all bailable accused persons. The burden of an improperly functioning system of bail based on monetary considerations is carried most heavily by the indigent who cannot afford to post any amount of bail or pay the bondsman's premium and consequently languishes in jail. For the destitute bail is impossible to make and represents an illusory alternative to detention. For the indigent bail is a real alternative only if the bondsman determines that the accused is a good risk.

The wealthy individual can secure his freedom (in most cases) without regard to the amount of bail that the court has set, but for the poor the professional bondsmen "hold the keys to the jail in their pockets."[29] Does this treatment come within the broad language of Justice Black in *Griffin* when he warned that "our own constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons?"[30] Before this can be answered, however, other issues must be considered.

D. *The Burdens Imposed*

Unlike the establishment of the right to court-appointed counsel and free transcripts, both reforms that have cost society a great deal of money, a reform of the present system of bail would result in a sizable saving for society. Indeed, in a period in which demands are made for more police at higher salaries, the present system of pretrial detention drains the police force of manpower and finances as it concurrently produces higher unemployment rates and swollen welfare rolls. In St. Louis, for example, a city in which seventy-nine percent of the defendants cannot raise bail, the community must bear

28 *Id.* at 625. While high bail is the major reason a defendant may not be able to obtain his pre-trial freedom, it is not the sole reason. A defendant might also be charged with several petty offenses with separate bail required for each offense, or he may be charged with a non-bailable offense. Wizner, *supra* note 24, at 117.

29 Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, j., concurring).

30 Griffin v Illinois, 351 U.S. 12, 17 (1956).

the cost of two dollars and fifty-six cents per day for an average period of six weeks for each defendant remaining in jail.[31] In New York City the cost per day reaches six dollars and twenty-five cents—a total of 10 million dollars per year.[32] When it is considered that thirty to forty percent of the total prison population in the District of Columbia were untried defendants who could not make bail,[33] it is clear to even the casual observer that pre-trial detention is an extremely costly burden in terms of the dollar outlay for prison accommodations.

The monetary burden is not the only one which the community must bear as a result of the incarceration of an accused. In most instances it will be the poor who will be unable to make bail. Because the members of this group are often hourly wage earners, their income and perhaps their jobs will be lost while in jail. If such defendants have families a community burden of providing income maintenance through welfare payments is created. If the defendants are in jail, they are also probably being deprived of their only means of securing funds to hire counsel. Therefore, the state will often have to appoint counsel and provide free transcripts on appeal. If the defendants were productive before arrest the community is also deprived of revenue it might otherwise have obtained. The defendants who cannot make bail, and often their families, become parasitic to the community. The realization of the existence of all of these costs to society is not of recent origin,[34] but a meaningful consideration of their total impact on the efficacy of the present bail procedure has been seriously neglected.

What are the effects on the accused? Unlike the costs to the community, the personal loss which a detained defendant experiences is covert and difficult to measure. The jailing of an accused will probably cause the loss of his job, the disruption of his family ties, and the exhaustion of his assets. Furthermore, he will be labeled a criminal by society for having spent time in jail. This prejudice to the defendant in his social relationships may in turn prejudice him at trial. Because of the importance of family ties and regular employment, the court may feel that this defendant's prospects for

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31 BAIL IN U.S., *supra* note 4, at 42.

32 *Id.* at 41-42.

33 *Id.* at 16-17.

34 II F. POLLACK & F. MAITLAND, *supra* note 7, at 584.

rehabilitation through probation have been lessened. There is empirical evidence which supports this apprehension.[35] Studies have shown that if two men are convicted of the same crime and are sentenced by the same judge, the defendant who could not make bail before trial will generally receive a harsher sentence, usually including imprisonment.[36] This was found true even though prior record, bail amount, type of counsel, family integration and employment stability were held constant.[37] The result is a form of predisposition punishment in which the determination of who is given pre-trial freedom is arbitrary. Prejudice may also arise from the fact that the defendant cannot aid in the preparation of his defense as effectively as the defendant who is released; nor can he identify or interview witnesses who might support his defense. In neighborhoods with a high percentage of transients, the personal contacts of the defendant may be essential due to the distrust of the residents. Without this personal contact, the unbailed accused's defense suffers.[38] With an adversary system that has been protected with a right to counsel at trial and on appeal, it is perhaps more important to see that the accused be given the opportunity to "[search] for evidence and witnesses, and [prepare] a defense"[39] than to provide assistance of counsel. Not only is the accused's defense not as effective, but with the prospect of prolonged imprisonment before trial, the imprisoned defendant is often coerced by the desire for freedom to plead guilty or waive a jury trial. He knows that he may experience many weeks in jail even if he is ultimately acquitted, but waiver or a plea of guilty free him almost immediately through

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35 Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964); Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U.L. REV. 67 (1963).

36 Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole*, 38 N.Y.U.L. REV. 67, 84-86 (1963); M. L. FRIEDLAND, DETENTION BEFORE TRIAL 110-25 (1965). Interestingly, this thesis was considered and rejected in Whitty v. State, 34 Wis. 2d 278, 287, 149 N.W. 2d 557, 560 (1967).

37 *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641, 655 (1964). 27% of 358 jailed defendants were not convicted. *Id.* at 642.

38 Whittington v. Gaither, 272 F. Supp. 507 (N.D. Tex. 1967). In this case, an indigent defendant in a robbery prosecution could not make bond and with no state procedure for personal recognizance he could not go to Mississippi to interview a witness needed for his alibi nor could he pay the witness fee required by the state; the court held this to be a deprivation of due process and sixth amendment right to counsel.

39 Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J. concurring).

probation.[40] Thus, although there is the popularly accepted philosophy in America that there is a presumption of innocence until proven guilty, the defendant without means to post bail experiences immediate imprisonment, societal prejudice before conviction and possible prejudice at trial. Even more disturbingly, this occurs in a system in which up to sixty percent of the *convicted* defendants are being released on probation without jail sentences.[41]

E. *Alternatives to the Present System*

In recognition of these problems, there has been widespread research and study directed toward finding methods of alleviating some, if not all, of the defects of the present system. A series of studies dating as far back as 1927 has finally led to the creation of reform projects.[42] Following the pattern of the successful Manhattan Bail Project,[43] similar projects were undertaken in other localities. Information has been the key to making these projects successful; personal data is obtained through interviews with the accused followed by telephone verification of four factors: (1) residential stability; (2) family contacts in the area; (3) employment history, and (4) prior criminal record.[44] Such information permits individual consideration of pre-trial release by the courts. It is evident that these projects are efficacious when the results of sixty such projects are considered. Judge Botein has remarked that of twenty-five thousand defendants released on recognizance at the state and local level, only 1.6 percent of them wilfully failed to appear.[45] Similar results were obtained with the Michigan district court project, which released seventy-one percent of all defendants on their own recognizance,

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40 Pye, *The Administration of Criminal Justice*, 66 COLUM. L. REV. 286, 293 (1966) BAIL IN U.S., *supra* note 4, at 16; *cf.* Dillehay v. White, 264 F. Supp. 164, 167 (M.D. Tenn. 1966).

41 BAIL & SUMMONS: 1965, *supra* note 26, at 58.

42 A. BEELEY, THE BAIL SYSTEM IN CHICAGO (1927). One of the first projects was begun in the 1940's by the United States District Court for the Eastern District of Michigan, using release on personal recognizance (ROR) rather than depending on monetary bail. Smith, *A New Approach to the Bail Practice*, 29 FED. PROBATION 3-4 (1965).

43 *See generally* Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. REV. 67, 71 (1963).

44 BAIL IN U.S., *supra* note 4, at 57-62; Thomas, BAIL IN CRIMINAL CASES, 15 WES. RES. L. REV. 435, 458 (1964). For a copy of a sample information form, see *Workshop: Establishing Bail Projects*, 1965 ILL. L.F. 42, 50-56.

45 BAIL & SUMMONS: 1965, *supra* note 26, at 15.

and ninety-nine percent of them returned for trial.[46] This figure compares favorably with those for defendants released after posting a monetary bond, who had forfeiture rates within the same federal jurisdiction of about three quarters of one percent.[47] No longer does the use of ROR have to be widely restricted by the courts, for "if carefully screened defendants are released pending trial on their own recognizance and treated with dignity; they will appear at trial."[48]

Illinois has approached the problem by concentrating on reform within the monetary bail system. For all bailable offenses in Illinois, the accused can obtain release by executing a bond in an amount equal to the bail set and by depositing with the court ten percent of that amount but in no event less than $25. The defendant receives a refund of ninety percent of his deposit if he appears in court at the appointed time.[49] It is felt that friends or relatives will probably be willing to help an accused secure the ten percent deposit knowing they have a reasonable expectation of having most of it returned. Rather than eliminating the use of monetary bail, this plan reduces the "costs" of freedom and makes it obtainable for an increased number of defendants. Yet, for the defendant who cannot afford even the minimum deposit and is without public credit or friends with money, release is just as remote as if bail were set at five thousand dollars. The plan is a meritorious movement toward a general reduction in the burdens imposed by the present arbitrary bail schedules, but fails to cope with the most difficult case—the destitute defendant faced with bail.

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46 Smith, *supra* note 42, at 4; in Cuyahoga County, Ohio the common pleas court sponsored a similar bail project and during its first four months of operation 46% of those interviewed were recommended for ROR. All of those recommended were released and they all returned for trial as ordered. BAIL & SUMMONS: 1965, *supra* note 26, at 8.

47 *Id.* at 5.

48 Goldberg, *Equal Justice For the Poor, Too.*, N.Y. Times, Mar. 15, 1964, § 6 (Magazine), at 101.

49 ILL. ANN. STAT. ch. 38, § 110-7 (Smith-Hurd Supp. 1967). Suppose a defendant charged with a misdemeanor had his bail set at $1,000. Under the Illinois 10% deposit provision, the defendant could execute a bond for $1,000 and deposit $100 (10%) with the court. Compliance with the terms of the bond would result in a 90% return of the deposit and the cost to the defendant of his pre-trial liberty would be only $10. If a professional bondsman were employed, the defendant would have paid $100 with no refund (assuming the premium and service charge were equal to 10%). *See generally* Bowman, *The Illinois Ten Per Cent Bail Deposit Provision*, 1965 ILL. L.F. 35.

Some attention has also been given to the implementation of police release procedure. This program involves the issuance of summons to the accused on minor criminal charges in lieu of arrest and detention. Without arrest, there is no problem of pre-trial detention or bail. The summons procedure frees patrolmen from stationhouse duty, saves the community the cost of housing detained defendants, permits a defendant to demonstrate his reliability by appearing for the hearing, and provides an opportunity for the accused to prepare his defense.[50] Most importantly, the economic considerations which pervade our present pre-trial release system are eliminated in favor of a form of personal recognizance.

The feasibility of these alternatives is shown by their adoption by Congress in the Bail Reform Act of 1966.[51] Combining many of the above alternatives, this reform measure provides for the release prior to trial of all persons charged with non-capital offenses on their own recognizance unless the district court determines that this will not assure their appearance. If such "ROR" is not sufficient, the judicial officer must still permit release, but may impose one or more conditions: third party parole, travel restrictions, daytime release, ten percent deposit, bail or any other conditions deemed necessary. For capital offenses and bail pending appeal, the same provision for release exists unless (in the court's judgment) none of the conditions will reasonably insure against flight or against threats to society.[52] As an added deterrent to flight, there is a provision for the forfeiture of any security pledged and, where the crime charged is a felony, the imposition of a five thousand dollar fine and/or five years imprisonment; in the case of a misdemeanor, the maximum misdemeanor fine and/or one year imprisonment.[53] This system of conditional ROR eliminates much of the arbitrariness of monetary bail by requiring individualization, not only for those trustworthy and reliable defendants but for defendants with a potential for flight that can be negated. Alternatives are available to the federal courts to formulate a combination which will assure the defendant's presence and at the same time maximize the individual's opportunities for freedom.

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50 BAIL & SUMMONS: 1965, *supra* note 26 at XV. *See*, M. FRIEDLAND, DETENTION BEFORE TRIAL 9-44 (1965) for the operations of summons procedure in Canada.

51 18 U.S.C.A. § 3146 (Supp. 1967). *See generally, Congress Reformed Federal Bail Procedures in 1966*, CRIME & JUSTICE IN AMERICA 46 (Cong. Quarterly Service, 1967).

53 18 U.S.C.A. § 3150 (Supp. 1967).

52 18 U.S.C.A. § 3148 (Supp. 1967).

F. *Constitutional Issues*

These reforms serve to show that there are less discriminatory alternatives to the prevailing bail system. Except for these small pockets of reform, the present procedures continue to "distort the purpose of bail, exaggerate the influence of professional bondsmen, and effect purposeless and unconstitutional discrimination against the poor."[54] Reform has not been so widespread that it moots possible constitutional issues. Given the problems of the many defendants who cannot secure bail in any amount, the extremely high expenses which accompany the implementation of the system, the prejudice resulting to the detained defendant, the misuse of the system by those empowered to implement it, and the availability of reasonable effective alternatives, the current system of bail may not meet the demands of the Constitution. At least one authority would suggest that a constitutional crisis in the field of bail is threatening.[55]

1. Eighth Amendment

Bail is mentioned specifically in the eighth amendment of the Constitution but is modified by the adjective "excessive."[56] The Court in *Stack v. Boyle*, speaking through Chief Justice Vinson, expressed a test to determine what is constitutionally excessive.[57] In that case twelve petitioners had been arrested on charges of conspiring to violate the Smith Act,[58] and their bail had been set at varying levels from $2,000 to $100,000. This was later modified to a uniform amount of $50,000 for each defendant. Claiming that this was "excessive" under the eighth amendment, the petitioners moved for reduction. The only evidence presented by the government was that four other persons convicted of the same charges had forfeited bail in another district, but it was not shown that they were linked in any way to the petitioners. On these facts the Court determined that bail had not been properly fixed and stated:

> If bail in an amount greater than that usually fixed for serious charges of crimes is required in the case of any of the petitioners, that is a matter to which evidence should be directed

54 Pannell v. United States, 320 F.2d 698, 702 (D.C. Cir. 1963) (Bazelon, c.j., concurring in part and dissenting in part).

55 Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 1125 (1965). This is a particularly exhaustive analysis of the entire bail area.

56 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

57 342 U.S. 1, 6 (1951).

58 18 U.S.C. §§ 371, 2385 (1964).

> in a hearing so that the constitutional rights of each petitioner may be preserved. In the absence of such a showing, we are of the opinion that the fixing of bail before trial in these cases cannot be squared with the statutory and constitutional standards for admission to bail.[59]

By stating that "bail in an amount greater than that usually fixed" is excessive, the Court has confused what is usual with what is adequate to assure the presence of the individual defendant. The wide use of bail schedules supports the observation that the norm in many jurisdictions is not an individualized amount. In fact, the use of a schedule negates any concept of an individually tailored bail amount. And further, the variance between the percentages of those defendants who make bail in different jurisdictions makes it apparent that the usual bail for any particular jurisdiction may be vastly different from that of any other.[60] The *Stack* test mocks the purpose and spirit of bail by ignoring the effects of a test that sanctions an avoidance of individualization and disregards what is required for adequate assurance in a particular case. The continued application of this test is intolerable. New content must be given to the bail clause of the eighth amendment. The determination that a defendant is bailable necessitates some manner of pre-trial release when alternatives exist which can place release within the defendant's reach while assuring his presence at trial. When determining whether the bail amount, if set, would be excessive, the judge must determine the probability that the defendant will appear at trial. Is the likelihood of flight so minimal that there will be no need for monetary assurances? As has been shown, a large percentage of the defendants in our criminal system do not need bail set for them and for such defendants *any* requirement of bail would constitute excessive surety. More than is necessary is by definition "excessive."

This does not mean that all defendants must be released pending trial. Account has been taken of those instances where the defendant might be so likely to flee that there is no other means than high bail to assure against flight. The legislative distinction between bailable and non-bailable offenses based on the fear of the flight of the defendant is preserved. The language of the Court in *Carlson v. Landon* may be of continued validity:

> [The English bail clause does not] accord a right to bail in all cases, but merely [provides] that bail shall not be excessive in

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59 Stack v. Boyle, 342 U.S. 1, 6 (1951).

60 *See* text accompanying note 28 *supra*.

> those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated a different concept.[61]

If the eighth amendment is to serve as the vehicle through which the present bail system is to be reformed to protect the indigent from unnecessary pre-trial detention, then the states must be brought within its command. Although many cases have assumed that the bail clause has been incorporated into the fourteenth amendment and made directly applicable to the states,[62] there has been no Supreme Court decision specifically incorporating the eighth amendment. In this light, an argument similar to that possible under the eighth amendment may be evolved within the state systems under their present law. Many states have constitutional provisions which grant a right to bail in all cases except those capital cases where "the proof is evident or the presumption great."[63] In theory this requirement of proof of guilt seems to require some clear evidence against the defendant to override the presumption of innocence before bail can be denied even in capital cases. In practice what constitutes the quantum of proof necessary to deny bail varies considerably among the states.[64] The courts are faced with the problem of balancing two competing values: the presumption of the defendant's innocence and his right to bail against the reluctance to release an accused who is suspected of committing a heinous crime. But where the quantum of proof is not sufficient to override the presumption of innocence then even in capital cases the bail is excessive if it in effect denies bail; for the state constitutional provisions speak in terms of "sufficient sureties." Again, where the concern is for sufficient surety and non-monetary alternatives are available, an indigent may have at the least a state-created right to pre-trial release on the theory that the amount of bail set is more than is sufficient.

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61 342 U.S. 524, 545 & n.44 (1952).

62 Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); Pilkinton v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963); Wansley v. Wilkerson, 263 F. Supp. 54, 56 (W.D. Va. 1967); People *ex rel.* Schildhaus v. Warden, 37 Misc. 2d 660, 672, 235 N.Y.S.2d 531, 546 (Sup. Ct. 1962); *Contra*, Comment, *Equal Protection and the Indigent Defendant: Griffin and its Progeny*, 16 STAN. L. REV. 394, 411-412 & n.91 (1964).

63 OHIO CONST. art I, § 9; *see* note 15 *supra*.

64 Comment, *Determination of Accused's Right to Bail in Capital Cases*, 7 VILL. L. REV. 438, 444 (1962). Further, the nature of the capital offense varies from murder, rape and even to robbery, *e.g.*, ALA. CODE, tit. 14, § 415 (1958) (Robbery).

2. Due Process

There is an appealing argument that when a defendant's bail is set at a level which he cannot satisfy and there is no other plan available within the jurisdiction for assuring against flight, then he is deprived of the fundamental fairness guaranteed under the due process clause of the fourteenth amendment.[65] The Court in *Griffin v. Illinois*[66] wished to insure that the indigent not lose his freedom as a result of an unjust conviction from which he could obtain no effective review. Is denying effective review any more reprehensible than denying the incarcerated accused the possibility of obtaining a fair trial in the first instance? The *Griffin* rationale seems to be directed at preserving the adversary system in order to maintain fair trials and not at establishing some abstract prohibition against all rich-poor distinctions. It would appear to be more efficient to secure fairness at the trial stage rather than during the corrective procedures of appeal. This fairness is best preserved when the defendant can aid in preparing his defense. Furthermore, the pre-trial release of the defendant alleviates the injustice of burdening a detained individual with the prejudices which accompany imprisonment. Also, the evidence which suggests that defendants plead guilty in order to avoid pre-conviction detention conflicts with any concept of due process. "Although [the defendant] alleges he is not guilty, he is denied fundamental fairness by being punished, imprisoned and presumed guilty before he has been tried."[67]

Congress has made the determination that within the federal system it is fundamentally wrong for there to be persons languishing in jail prior to conviction when the sole cause of their remaining there is poverty; the result of this determination was the Bail Reform Act of 1966.[68] It is possible that the due process clause may require the application of this same standard by the states in their bail procedures. The Court has determined in recent cases that federal standards will determine the scope of the constitutional guaran-

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65 *Contra,* Priest v. Department of Corrections *ex rel.* Nardini. 268 F. Supp. 242, 244 (D. Del. 1967) (being subjected to police questioning following a failure to meet the required bail does not amount to an invidious discrimination nor a denial of due process).

66 351 U.S. 12 (1956).

67 Meltsner, *Pre-trial Detention, Bail Pending Appeal, and Jail Time Credit: The Constitutional Problems and Some Suggested Remedies,* 3 CRIM. L. BULL. 618, 624 (1967).

68 18 U.S.C.A. § 3146 (Supp. 1967).

tees under several of the provisions of the Bill of Rights.[69] *Malloy v. Hogan*[70] decided that the federal standard as espoused in *Hoffman v. United States*[71] for the protection of the personal right to remain silent must be applied in state proceedings. Cannot a similar argument be made here? Within recent years the protection of the fundamental right to personal freedom for the wealthy and the poor alike has become possible in the federal courts without reliance on financial surety. The states must not be permitted to ignore this development.

3. Sixth Amendment

If a defendant cannot aid in his own defense because he is detained in jail for lack of bail money, he may be denied the effective assistance of counsel. He cannot seek or question witnesses who may aid his defense. This may raise a sixth amendment—due process question since it has been established that there is a constitutional right to effective assistance of counsel, at least in all felony cases.[72] It has recently been recognized that an unusual difficulty of contact between the accused and his counsel may substantially interfere with the right to effective counsel.[73]

Also of questionable validity is the practice of some states of determining the right to have counsel appointed by the state by reviewing who has been freed on bail.[74] If the defendant posts bail, he is not considered to need state aid for counsel. For the defendant whose resources are sufficient for either bail or retained counsel but not both, there is a choice between having state-appointed counsel and remaining in jail, or of losing the right to state appointed counsel and being free. Forced payment for one constitutional right with the waiver of another cannot be condoned.

4. Equal Protection

The expansive language of *Griffin* and *Douglas v. California*[75] has led many commentators to advocate that equal protection should

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69 Duncan v. Louisiana, 391 U.S. 145 (1968).

70 378 U.S. 1 (1964).

71 341 U.S. 479, 486-87 (1951).

72 Entsminger v. Iowa, 386 U.S. 748 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963).

73 United States v. Bitter, 374 F.2d 744, 750 (7th Cir.) (Schnackenberg, j., dissenting), *rev'd*, 389 U.S. 15 (1967).

74 Silverstein, *supra* note 27, at 645.

75 372 U.S. 353 (1963).

be the avenue by which bail is attacked.[76] The argument is made that the rich man goes free while the poor man is kept in jail without a legitimate state interest to support this result. This analysis applies a balancing test which weighs the various interests involved. First, a permissible state goal must be found to support a discriminatory classification; then there is an evaluation of the classification scheme chosen by the state to determine whether it is "reasonable." If less discriminatory methods are available for attaining the state's goal, the method chosen is too broad and thus unreasonable. With bail, the importance of freedom and the advantages it brings to an accused at trial must be weighed against the interest of the government in maintaining the integrity of its criminal system through assurance that those who have been accused of a criminal act appear for trial. As indicated, with bail there can be no argument by the state that the present program is necessitated due to the economic expense of the alternative; it is the present system which is so costly to the state. Less costly alternatives exist which protect the same interest without unnecessarily depriving defendants of their pre-trial freedom. The alternatives result in a substantially reduced burden being placed on the accused and his family, which should weigh heavily in any consideration on the merits of the present and any proposed systems. *Prima facie* this would appear to be a situation in which a violation of the broad equal protection language of *Griffin* might be found. One of the most forthright statements of this position was that of Justice Douglas in his much-quoted opinion in *Bandy v. United States.*[77] The action was a motion to Justice Douglas for the reduction of the applicant's bail pending certiorari. Justice Douglas denied the application for reasons unimportant here. Following the statement that "we have held an indigent is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence," Justice Douglas queried with reference to bail, "[c]an an indigent be denied freedom, where a wealthy man would not, be-

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[76] Foote, *supra* note 55, at 1180.

[77] 81 S. Ct. 197 (1960) (Douglas, J., sitting as a circuit judge). The decision has been relied upon by many commentators as a guidepost foretelling the path which the Court will follow in the area of bail. In a later petition from the same party Justice Douglas continued, "Further reflection has led me to conclude that no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on 'personal recognizances' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court." Bandy v. United States, 82 S. Ct. 11, 13 (1961).

cause he does not happen to have enough property to pledge for his freedom?"[78]

While the broad language of *Griffin* might conveniently lend itself to a court's desire to reform the present bail system there is a basic problem in relying on it. As an established rule of statutory and constitutional construction the specific must prevail over the general. Bail is specifically dealt with in the Constitution as part of the eighth amendment. In *Gideon v. Wainwright*[79] the Court chose to rely on the specific language of the sixth amendment to establish the right to counsel in state felony cases in preference to reasoning through the general due process provision of the fourteenth amendment. This would seem to be the proper approach for the Court to take in the cases involving bail. There is no reason for the Court to invite criticism that it is embarking on a war on poverty through the use of the general and expansive language of the fourteenth amendment when the same results can be obtained through the use of other correctional doctrines.*

R. Lamont Kaiser

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78 81 S. Ct. at 197-98.

79 372 U.S. 335 (1963). Justice Clark concurred in the result by relying on the fourteenth amendment.

* The arguments and reasoning in this article relating to the present bail system may be easily adapted to an attack on the use of fines and alternative sentences as a means of criminal punishment. Judge Edgerton has stated in dissent:

> The nature of the penalty actually inflicted by a sentence of $25 or 10 days depends on the dependent's financial ability and personal choice. If he chooses, and is able, to pay the fine, he can avoid imprisonment. If he chooses imprisonment, he can avoid the fine. If he cannot pay the fine, he cannot avoid imprisonment.

Wildeblood v. United States, 284 F.2d 592, 593 (D.C. Cir. 1960).

Courts have begun to attack the unfettered use of fines and alternative sentences in the situations where they are most oppressive and the forces of change are beginning to stir for reform. *See, e.g.*, People v. Tennyson, 19 N.Y.2d 573, 227 N.E.2d 876 (1967); People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686 (1966); *ABA, Standards Relating to Sentencing Alternatives and Procedures*, § 6.5 (Tent. Draft, 1967).